RECORD
AND
BRIEFS

No. 16-1161

In the Supreme Court of the United States

BEVERLY R. GILL, *et al.*,

Appellants,

v.

WILLIAM WHITFORD, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Wisconsin

BRIEF FOR *AMICUS CURIAE* CENTER FOR MEDIA AND DEMOCRACY IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST[1]

The Center for Media and Democracy (the "Center") is a nonprofit, nonpartisan organization based in Madison, Wisconsin. Founded in 1993, it has focused on investigating and exposing abuses of power that corrupt the proper workings of democratic government. Its particular interest in this case is to expose incorrect claims as to the legislative history of gerrymandering in Wisconsin and distorted reports of Wisconsin election results and to supply insight into the current state of Wisconsin politics. The Center offers this brief to respond specifically to points in Sections I.A and II.B, C and D in the Brief for the Wisconsin State Senate and Wisconsin State Assembly (the "Legislature") that are within the Center's experience. The Center also wishes to point out the damage a gerrymander inflicts on others in addition to the targeted minority party, in this case Wisconsin Democrats. The credibility of the Center's work is established by its more than two decade history of citations in the New York Times, Washington Post, the Los Angeles Times, POLITICO, the Guardian, the New Yorker, Bloomberg, WIRED, Vice and The Atlantic as well as on CNN, MSNBC, NBC, CBS, PBS and NPR.

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[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from Amicus Curiae, its members and counsel have made any monetary contribution towards the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Legislature[2] describes a fair, deliberative, policy-driven legislative process that bears no relation to the actual process by which Act 43 became the law of Wisconsin. The short answer to many of the Legislature's claims is that the only policy driving Act 43 was preservation of one-party domination of the Wisconsin Assembly and the incumbency of the legislators who voted for it.[3] That was the evidence, and the Appellants have not contested the district court's finding of intent.

The Legislature argues that the power of incumbency, differences among individual candidates, and other factors drive election results. But actions speak louder than words. In drafting Act 43, the Legislature wholly ignored the factors it now applauds. Instead it used reliable statistical analyses of historical data to project the durability of the Republican legislative majority under the Act 43 map against various possible shifts in relative party strength. Indeed, the evidence shows that party affiliation explains well over 95% of a voter's decision on Assembly candidates. The Legislature now asks the Court to ignore that core fact: in designing its gerrymander, the Legislature embraced the very principles and analysis it now argues against.

The legislators who supported Act 43 preserved their own seats and positions in the legislative

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[2] The Wisconsin Legislature's amicus brief is cited as "Br."

[3] The plaintiffs challenged only the Assembly map, but because the Senate districts are nested within the Assembly districts, this decision necessarily impacts the Senate map as well.

hierarchy and uniquely benefited from it. This gerrymander is thus the product of a strain of conflict of interest that infects few other forms of legislation. This gerrymander is immune from the checks and balances that operate on normal legislation. In Wisconsin, as in about half the states in the Union, there is no voter initiative to correct this abuse of power by enacting a redistricting procedure without the Assembly's approval. Without court intervention, this gerrymander will survive despite its partisan origin and anti-democratic impact.

Prior court intervention over the past three decades in Wisconsin arose from the Legislature and the Executive's inability to agree on maps, not from any inherent difficulty in drawing districts. The remaining complexities in districting that the Legislature cites arise from compliance with the Voting Rights Act and the recognized constitutional prohibition on racial gerrymandering. These will govern any redistricting regardless of the outcome of this case. The Appellees ("Wisconsin Voters") proved and the Appellants have not contested that computers are fully capable of drawing maps without political data that still respect traditional districting principles.

Modern technology offers a uniquely reliable methodology for building a fortress around a transient majority's control through intentional maximization of the number of districts deemed safe for one party. In Wisconsin, as in most states, a map not dominated by partisan animus will still produce some districts that heavily favor one of the two major parties. But in Act 43 the State intentionally maximized the number of safe districts, cutting meaningfully competitive

districts in half in the process. The Legislature does not address the basic data that show the durability of a partisan majority riding the back of a well-drawn gerrymander. And Wisconsin as a result has one of the most partisan legislatures in the nation. Nor does the Legislature offer an answer to the most obvious question: If the authors of Act 43 did not believe in analyzing past election results to predict future results and maximize the likelihood of an impenetrable Republican majority, then why did they spend nearly half a million dollars of public money on sophisticated computer analysis by outside consultants to do just that?

In conferring this personal benefit on themselves, the legislators who enacted Act 43 imposed a high cost on the millions who must live under the Act 43 maps. A gerrymander intentionally invades the representative rights of millions of citizens. A legislature with few competitive races imposes multiple barriers to the proper functioning of democratic government. Candidates in both parties are obliged to appeal not to the electorate as a whole, but only to a majority of their party. The result is a legislative body unrepresentative of the voters as a whole and resistant to compromise. And the elimination of meaningful races in the general election is damaging to the body politic, producing large numbers of unopposed candidates, fewer competitive races, increased voter apathy, lower turnout, and suspicion of government.

There is of course no Constitutional right to proportional representation, and nothing in this case would change that. But individuals and political parties have a constitutional right not to be targeted by

the state for partisan reasons. That is what happened to the Wisconsin Democratic party and to voters in districts purposely manipulated to pack minority party voters into supermajority districts or increase majority party voters in other districts to levels deemed safe for the majority.

The handful of races the Legislature offers as examples of competitiveness are outliers among the 297 races in Wisconsin's 99 Assembly districts in the three election years since 2012. In fact only about 20–not the 75 the Legislature says–of those 297 races were actually competitive. To be sure, an occasional candidate will succeed in a competitive or even slightly adverse district. But the overwhelming and uncontested data of record show these anomalies are few and far between and extremely unlikely to overcome the intended statewide partisan tilt of a sophisticated computer-driven gerrymander such as Act 43.

Wisconsin has seen litigation break out after each census since 1980, but only because the government was divided and could not agree on any map, forcing courts to act. Establishment of an objective standard for impermissible manipulation, rebuttable by a state's ability to justify its action as required by legitimate districting considerations or otherwise, should over time reduce the need for court intervention. And, of course, as the district court noted, a state could eliminate any presumption of impermissible motive simply by employing a neutral process.

In addition to impairing the proper function of the legislative branch, a gerrymander intentionally invades the representative rights of millions of citizens. A

gerrymander is intended to, and does, place the election of the legislator for each district in the hands of the voters in the primary of the party with a majority in that district. It thus purposefully maximizes the number of voters who have no meaningful voice in the selection of their legislators and facilitates candidates from the far right and left. Not only Democrats are deprived of a vote in a majority of districts. In many states voting in a primary requires a public declaration of affiliation with that party. Independents and third party supporters who are unwilling to do that have no vote in the only contest that matters in the selection of their legislator. They suffer the ultimate impairment of representational rights. Thus, though Democrats are the target of the Wisconsin gerrymander, Act 43 inflicts collateral damage on many voters of both parties and of no party.

ARGUMENT

The Wisconsin Legislature is systematically depriving Wisconsin's voters of the "fair and effective representation for all citizens [which] is concededly the basic aim of legislative apportionment." *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964). It has been the law of the land for over 50 years that the Constitution "guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights. . . ." *Id.* at 566. The Wisconsin Voters proved below that the Legislature is doing precisely that and worse: discriminating based on voters' own political views and associations. This

tramples not only the Fourteenth Amendment but the First Amendment as well.

The Center submits this brief because Wisconsin's voters need this Court's help. Given the inherent conflicts of interest and human nature, and given the structure of Wisconsin government, this problem will not fix itself.

I. Wisconsin's Pre-Act 43 Redistricting Problems Sprang From Divided Government, not Litigation, and the 2011 Process of Enacting Act 43 Was Anything but a Triumph of the Policy-Driven Process the Legislature Describes.

The Legislature cites repeated litigation over Wisconsin legislative maps since 1972 to warn that partisan gerrymandering claims would invite additional federal "intrusions into the legislative process." Br. 7-8.[4] But in the three decades leading up to Act 43, federal courts were not drawn into the

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[4] In the attempt following the 1980 census, the Republican governor vetoed the Democrat-controlled legislature's map, leading to court intervention. *See Wis. State AFL–CIO v. Elections Bd.*, 543 F.Supp. 630, 631 (E.D. Wis. 1982). The same thing happened following the 1990 census. *Prosser v. Elections Bd.*, 793 F.Supp. 859, 861-62 (W.D. Wis.1992) ("Both houses of the Wisconsin legislature have a Democratic majority, but not a large enough one to override vetoes by the state's Republican governor."). And following the 2000 census, the divided state legislature (Democrat controlled Senate and Republican controlled Assembly) failed to produce a map, again resulting in a court-drawn map. *See Arrington v. Elections Bd.*, 173 F.Supp.2d 856, 858-59 (E.D. Wis. 2001); *Baumgart v. Wendelberger*, No. 01-C-0121, 02-C-0366, 2002 WL 34127471, at *1 (E.D. Wis. May 30, 2002) (per curiam), amended by 2002 WL 34127473 (E.D. Wis. July 11, 2002).

mapmaking process by any tide of plaintiff-driven litigation. Instead, divided state government failed to agree on any map that met population standards required by the most recent census. *See id.* Court intervention was required then; and intervention will be required in the future if the Legislature and Governor cannot produce a proper map. None of this implicates partisan gerrymandering claims.

The Legislature also complains that limiting partisan gerrymanders will impose great burdens on the Legislature. Yet with relative ease, a single political scientist, expert witness Kenneth Mayer, Professor of Political Science at the University of Wisconsin, was able to draw a map adhering better to traditional redistricting criteria than the Legislature's map and that did not discriminate against voters based on political preference. Courts find the job similarly manageable. *See, e.g., Peterson v. Borst*, 786 N.E.2d 668, 677-78 (Ind. 2003) (using software supplied by parties without political data, Indiana Supreme Court staff drew city-county council districts with minimal population variation, regular shape, and respecting internal lines within a few hours, resulting in a map widely viewed as fair); A. Scott Chinn, *The Role of Indiana's State and Federal Courts in Legislative Redistricting*, 1962-2003, 37 Ind. L. Rev. 643, 657-59 (2004); Daniel R. Roy, *How Political Turf Battle Morphed Into Legal Contest Before State's Highest Court*, 46 Res Gestae, June 2003 at 20, 22. Indeed, analysts can now create through computer algorithms hundreds or even thousands of maps that comply with traditional criteria. *See, e.g.*, Jowei Chen & Jonathon Rodden, *Cutting Through the Thicket: Redistricting*

Simulations and the Detection of Partisan Gerrymanders, 14 Election L.J. 331, 338 (2015).

Neither do partisan gerrymandering claims threaten the Legislature's discretion to make policy. The Wisconsin process that produced Act 43 in particular deserves little deference to the policy-making prerogatives normally accorded the legislative branch. Remarkably, given the record before this Court, the Legislature portrays that process as a breakthrough of good government. Br. 8. The Legislature describes "months of full-time work by legislative aides meeting with caucus members and drafting maps that complied with traditional criteria." *Id.*

But the legislative process that produced Act 43 was not conducted in the usual sunshine of public introduction of a bill, hearings, and amendments. The press, public, and even most legislators first saw Act 43 on the eve of its passage. Individual Republicans, but not Democrats, were permitted to view their new districts at a secret location outside the Capitol building. Even those Republicans were not given access to the map as a whole and were sworn to secrecy contrary at least to the spirit of Wisconsin's strong open meetings and records laws. Jurisdictional Statement Appendix[5] 12a; Joint Appendix[6] 355; Wis. Stat. §§ 19.31-19.39; 19.81-19.98. Due to the inherent complexity of any written districting bill, which identifies each district as a list of dozens of wards, it was impossible for anyone newly introduced to Act 43

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[5] The Jurisdictional Statement Appendix is cited as "JSA."

[6] The Joint Appendix is cited as "JA."

to have a meaningful clue as to the boundaries of each of these new districts before it was enacted. The entire public process from introduction to approval by both houses of the Legislature consumed only ten calendar days. JSA 29a. *See also Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F.Supp.2d 840, 845-46 (E.D. Wis. 2012) (describing secretive and hurried process; "every effort was made to keep this work out of the public eye and, most particularly, out of the eye of the Democrats").

In short, the Legislature's claim that Act 43 is the product of public-spirited deliberation and wise policy choices is preposterous.

The Legislature's claim that it exercised "constitutionally conferred policy-making discretion" assumes, wrongly, that Act 43 complies with the Constitution of the United States. Br. 6. Gerrymandering is qualitatively different from other legislation, and the key reasons for deference to the policy calls of the legislative branch carry little weight when it comes to redistricting, the primary motive of which is partisan advantage.

First, the "policy" that drove Act 43 was indeed that impermissible goal: partisan advantage. A majority of the Court has already declared partisan gerrymanders "incompatible with democratic principles." *Ariz. Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (internal quotations omitted). This Court held decades ago, and has never wavered from the rule, that state discretion in districting is constrained by the constitutional rights of the voters. *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964). As the district court noted, the

notion that some "partisan considerations" are lawful in districting originates with *Gaffney v. Cummings*, 412 U.S. 735 (1973), but *Gaffney* held that partisan considerations may be used to make districts more fair and representative, not for the "invidious" purpose of minimizing the voting strength of political groups. *Id.* at 752-54; JSA 66a-68a.

The *Gaffney* line is entirely consistent with this Court's long-held consensus that partisan gerrymandering presents, at the very least, a significant constitutional problem. In *Vieth v. Jubelirer*, five Members of this Court explicitly recognized that extreme partisan gerrymandering violates the Constitution. *See* 541 U.S. 267, 307, 312-16 (2004) (Kennedy, J., concurring in judgment); *id.* at 317–318 (Stevens, J., dissenting); *id.* at 343, 347–52 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 356–57, 366–67 (Breyer, J., dissenting). The other four Justices in *Vieth* stated that they did not disagree with that conclusion. *See id.* at 292 (plurality opinion) (a dissent addresses "the incompatibility of severe partisan gerrymanders with democratic principles. We do not disagree with that judgment.").[7]

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[7] Six Justices in *Davis v. Bandemer*, 478 U.S. 109 (1986), had held the issue justiciable, but four of the six found proof of the loss of a majority in the legislature insufficient to establish a lasting impairment of voting rights. *See id.* at 118-27, 134-37. In *Vieth* five Justices affirmed that the issue was justiciable, but Justice Kennedy found no reliable measure of the impairment of voters' First or Fourteenth Amendment rights. *See* 541 U.S. at 313-14. Plaintiffs here offer proof of durability and a measure of an impairment that shifts the burden of explanation to the State to show that the impairment was not the product of partisan gerrymander.

Second, Act 43 is the product of a conflict of interest different in kind from conflicts that affect any other form of legislation. Each of the legislators who foists a gerrymander upon the citizens of the state is among the small group of individuals whose careers, positions in the legislative hierarchy, and fundraising capacity are cemented by their party's majority status. Normal checks and balances and deliberative policy processes do not operate in this environment. *See Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2672 (describing the inherent conflict of interest "when legislators draw district lines that they ultimately have to run in" and the Founders' purpose behind the Elections Clause "to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate") (internal quotations omitted).

Here, legislators used State power in their own self-interest to disempower political opponents for a decade or more. JSA 145a-146a. In the process, the Legislature has maximized the number of safe majority districts, rendering the election of legislators in the general election a foregone conclusion in most of Wisconsin, depriving independents of any meaningful vote in most districts, and contributing to an unrepresentative legislature. Throughout its defense of gerrymandering the Legislature ignores entirely that these consequences flow from legislation intentionally designed for impermissible partisan reasons.

Finally, although the Legislature tells the Court that partisan voting swings and dozens of competitive races protected Wisconsin's voters from the gerrymander, the facts show just the opposite. The

number of elections in competitive districts under Act 43 does not approach the 75 claimed by the Legislature. Br. 30. The Legislature does not disclose its standard for a competitive election.

In his 2011 work for the Legislature, Professor Keith Gaddie defined a district as "swing" if neither major party had more than 52% (an advantage of up to 4%) of the total major party vote. SA 325. Act 43 reduced the number of swing districts by almost half, from 19 to 10. *Id.* Even treating margins up to a 6% advantage as competitive, half again Professor Gaddie's cutoff, the number of competitive elections was 11 and 15 in 2008 and 2010, respectively, but then dropped under Act 43 in 2012 to 12, then five, then three in 2016. SA 325, Exs. 535 to 541; *Wisconsin Election Results*.[8] That adds up to 20, not 75, elections in competitive districts out of 297 in the last three cycles—less than 7% by a measure half again as generous as that applied by the Legislature's own consultant.

The Legislature also overstates Republican performance in close districts by choosing a skewed group of "competitive" districts. Though the Brief presumes that the 29 Act 43 districts at 55%-45% or closer were competitive, it ignores that 14 of those 29

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[8] Citations herein to *Wisconsin Elections Results* reflect analyses of official election data available at Wisconsin Elections Commission, http://elections.wi.gov/elections-voting/results (last visited Sept. 1, 2017). Election data is also available in downloadable format at *Wisconsin State Legislature Open GIS Data*, Legislative Technology Services Bureau, http://data-ltsb.opendata.arcgis.com/datasets/2012-2020-wi-election-data-with-2011-wards/data?selectedAttribute=PREREP12 (last visited Sept. 1, 2017).

districts actually leaned Republican (*i.e.* were over 52% Republican but did not reach the "safe" level of 55%). SA 325. This is more than three times the four districts that leaned Democratic. *Compare* Br. 29-31 *with* SA 325. Thus, the Legislature's argument proceeds not from a group of true swing districts but from a larger group strongly tilted to favor the Republican party.

II. The Record Strongly Supports the District Court's Finding—and Act 43's Guiding Principle—that Past Party Preferences Reliably Predict the Future Statewide Behavior of Wisconsin's Voters.

The Legislature does not deny that it deliberately gerrymandered Wisconsin's legislative districts in 2011 in a manner carefully calculated to give Republicans durable and sizable majorities for a decade. Nor does the Legislature contest the proof and the district court's finding that the Act 43 maps were not required by traditional redistricting criteria. Instead, the Legislature contends that the Wisconsin Voters' claims are based on "factual assumptions that are inconsistent with how representative democracy works. . . ." Br. 17.

The Wisconsin Voters' claims and the district court's findings are based not on "assumptions" but on hard facts supported by voluminous evidence. Specifically, the district court's opinion, unlike the Legislature's argument, is based on evidence and careful analysis of years of data from 99 Assembly districts, not cherry-picked examples from a handful of elections in the few competitive districts that survived Act 43. And, of course, the Legislature's argument to this Court is contradicted by the Legislature's own research,

analysis and conduct in successfully gerrymandering the State of Wisconsin.

A. Actions Speak Louder than Words: the Legislature Has Changed its Tune Since the 2011 Redistricting Process.

The Legislature's own conduct in 2011, proven in *Baldus*, 849 F.Supp.2d at 845-46, and again in this case, directly contradicts what it now tells this Court.

The district court, in a finding not contested here, said:

> In sum, from the outset of the redistricting process, the drafters sought to understand the partisan effects of the maps they were drawing. They designed a measure of partisanship and confirmed the accuracy of this measure with Professor Gaddie. They used this measure to evaluate regional and statewide maps that they drew. They labeled their maps by reference to their partisanship scores, they evaluated partisan outcomes of the maps, and they compared the partisanship scores and partisan outcomes of the various maps. When they completed a statewide map, they submitted it to Professor Gaddie to assess the fortitude of the partisan design in the wake of various electoral outcomes.
>
> The map that emerged from this process reduced markedly the possibility that the Democrats could regain control of the Assembly even with a majority of the statewide vote. The map that would become Act 43 had a pickup of 10

> Assembly seats compared to the Current Map. As well, if their statewide vote fell below 48%, the design of Act 43 ensured that the Republicans would maintain a comfortable majority.

JSA 138a-139a.

Were a party's likely statewide success not largely predictable based on the party's showing in prior elections, the Legislature would not have spent $431,000 of state money and weeks of effort analyzing past elections in various combinations of wards to test the durability of ever more partisan majorities against possible future swings in the relative public support for the two major parties. JA 186. The Legislature claims various other factors affect districting choices, but the record reveals no evidence that in drawing its maps the Legislature considered any nonpartisan policy or the record or character of any individual candidate. Br. 20. Indeed, the State here admits the Legislature's vote projections in 2011 "took no account of incumbency, candidate strength, or other Assembly-district-specific factors." Appellants' Brief 15.

In 2011 the Legislature hired consulting expert Professor Keith Gaddie[9] to evaluate the future vote breakdown that could be expected under a series of draft redistricting plans. SA 322; JSA 12a-13a. Professor Gaddie calculated a "partisan score" based on regression analysis to measure the party preference of voters in existing and proposed districts. *Id.* He then confirmed that his regression analysis tracked closely

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[9] The district court concluded: "We find [Gaddie's] testimony credible." JSA 127a, n.181.

with the Republican staff's "composite score" of partisanship and told his clients that their composite score was "an almost perfect proxy for open seat vote, the best proxy you'll come up with." JSA 17a-18a, 127a, Ex. 175 at 1. Professor Gaddie used methods very similar to Professor Mayer's to gauge partisanship, and these experts for both sides agreed that partisanship would in turn predict legislative outcomes. JA 164-65; JSA 14a, 47a-48a, 54a, 127a-128a, 131a. In fact, Professor Gaddie also noted to his clients the "top-to-bottom party basis of the state politics." SA 322. Moreover, his projections regarding the Republican advantages under the enacted plan were borne out–in a good year for Republicans, the Republicans did even a little better than Professors Gaddie, and Mayer, predicted. JSA 148a, 153a, 158a (". . . we have the actual election results to confirm the reliability of Professor Gaddie's model . . . .").

B. The District Court Relied on Extensive Data Proving that Voter Party Preference Reliably Predicts Assembly Vote in the Vast Majority of Districts.

The Legislature claims voters "choose[] candidates based on their records and positions, not just their political parties." Br. 20. But as the district court found and the data demonstrate, voters' choices are overwhelmingly influenced by party rather than individual candidate characteristics. Creating a robust majority of safe districts produces a very high probability of preserving one-party control throughout the decade. The district court never suggested every district would inevitably follow the party preference its history suggested. But the underlying proven fact is

that "safe" or "strongly leaning" districts rarely fall outside the pattern.

The Wisconsin Voters' expert Kenneth Mayer testified at length and virtually without rebuttal on these points. JSA 13a-14a, 147a-152a. Professor Mayer's testimony and the district court's findings considered statewide data—not a handful of selected races—to demonstrate the high correlation between party preference in presidential vote and Assembly races. His regression analysis considered a variety of independent factors that might influence elections and proved presidential vote accounted for 93% to 94% of the variation in Assembly vote. SA 47. Professors Gaddie's and Mayer's projections are also closely correlated, reinforcing their reliability as predictors of Assembly vote. Professor Mayer actually compared his estimate of the partisanship of each district against Professor Gaddie's own calculations. "The r-squared for this regression is 0.96, indicating that the two measures are almost perfectly related, and are both capturing the same underlying partisanship." SA 55-56.

Professor Mayer noted that the presidential vote share "correlates very strongly with other more complex measures of partisan strength." SA 39. He showed graphically how closely Assembly vote tracks presidential vote in Wisconsin:

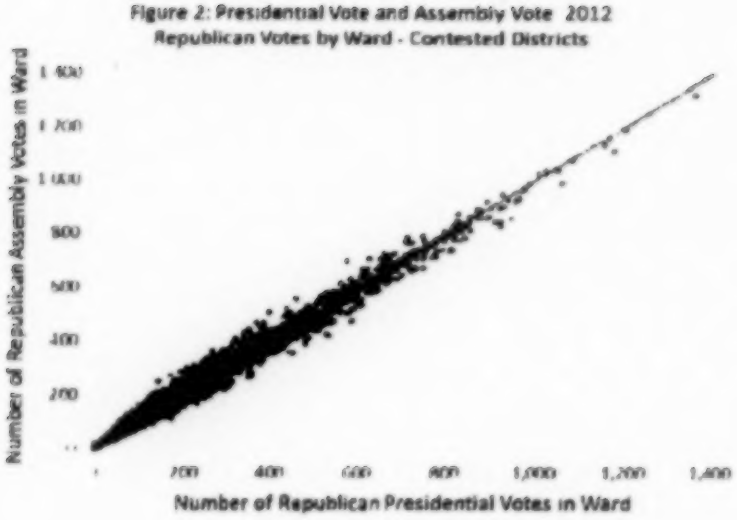
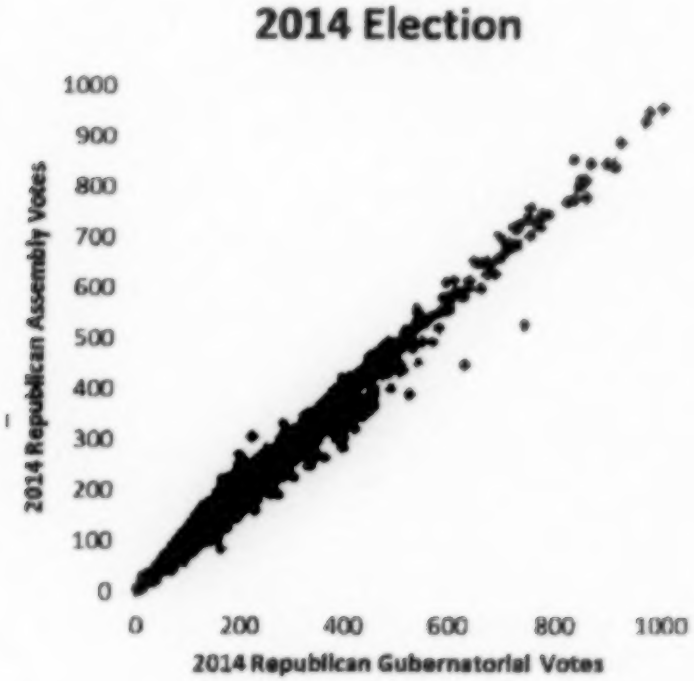


Figure 2: Presidential Vote and Assembly Vote 2012
Republican Votes by Ward - Contested Districts
Number of Republican Assembly Votes in Ward
Number of Republican Presidential Votes in Ward

Further voting data from 2014 and 2016 shows the same correlation.[10]



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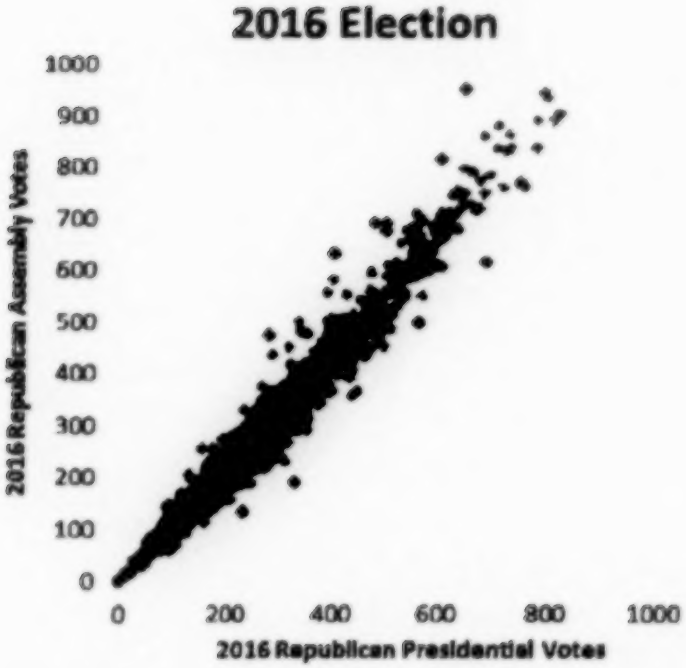
[10] *Wisconsin Election Results*, *supra*. Graphs generated by Microsoft Excel 2010.



The ward-by-ward vote totals from the elections under Act 43 show the high correlation between votes for Republican candidates for governor and president and votes for Republican Wisconsin State Assembly candidates. The best-fit line for these data points, one for each ward, shows a one-to-one ratio. They demonstrate how the vote at the top of the ticket matches closely the vote in each ward for the party's legislative candidates. In each of the three elections, in numerical terms, the correlation exceeds 0.987.[11] Because the real world is rarely perfect, however, the relationship has just enough play to give the Legislature the few outliers it discusses in its Brief.

In short, the district court's finding of a high correlation between a district's party preference, commonly measured by presidential vote, and its vote

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11 "Multiple R," Microsoft Excel 2010.

for state legislators is not clearly erroneous. It is correct and is confirmed by the experts.

C. The Legislature's Hand-Picked Examples Prove Nothing.

Rather than address this extensive data and expert testimony based on all races, the Legislature now offers the Court anecdotes from five of the 792 Assembly races held between 2002 and 2016. Anecdotes cannot rebut the strong statistical correlation detailed in the record. *See, e.g.*, Reference Manual on Scientific Evidence: Third (Statistics), 217-18 (citing shortcomings of anecdotes in establishing reliable correlation between an alleged cause (here, individual factors other than party affiliation) and effect (here, statewide vote for a party)). But, these particular anecdotes suffer from additional flaws.

(1) The Legislature first points to four of the 297 Assembly races in 2008, 2010 and 2012, in which Republican candidates outperformed the national ticket. Br. 20. These are not random selections. Under Act 43 the Legislature's composite score for District 96 narrowed from 53.6% to a 46.4% Democratic advantage in 2012, and District 49 favored Democrats by 50.41% to 49.59%, making it one of the few truly competitive districts after Act 43. SA 325. Moreover, the Legislature itself identifies a major reason these two districts did not follow form: the two Republicans who won races in Democratic districts had demonstrated a strong independent streak and opposed Governor Walker on the 2011 Act 10 that

sparked mass protests and launched a new era of partisanship in Wisconsin. Br. 20.

(2) The Legislature's next set of districts "that have changed hands within the same districting cycle,"[12] *id.*, show in almost every case the strong correlation between direction of vote change in state Assembly races and top-of-ticket races. Br. 20-22. Democrat Danou won in 2014 but was unseated by a Republican in 2016—a strong Republican year. Br. 21. Similarly, Republican Rivard lost to a Democrat in 2012, a strong Democratic year—but then Republican Quinn recovered the seat in 2014 (a Republican year statewide and nationally) and did better in 2016 along with the surge in Republican support. *Id.* And Representative Vruwink, a Democrat, won in the 2012 presidential election year but then lost in 2014 to a Republican, whose margin then predictably increased in 2016 when President Trump won Wisconsin. *Id.* None of these districts was packed with Democrats: they ranged from 44.3% to 52.18% Republican post-Act 43. SA 325.

(3) The Legislature next looks to the 2002 to 2010 districting cycle to find two districts in which party preference shifted. Br. 21. These elections were conducted under court-drawn maps that included at least twice as many competitive districts as Act 43. SA 325. The races the Legislature cites were in districts that

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[12] District 70, District 75 and District 92.

would be expected to shift with the relative political fortunes of the two major parties. Specifically, District 28 swung from Republican to Democrat in 2006 and back to Republican in 2010. Br. 21. District 68 swung from Democrat to Republican in 2004, back to Democrat in 2008 and back to Republican in 2010. *Id.* These changes reflected national trends as one would expect in what the Legislature refers to as "traditional 'swing' districts." *Id.* But, in 2011, Act 43 did away with many competitive districts, and minimized this healthy effect that the Legislature purports to value so highly. *See* pp. 12–14 above.

(4) Last, the Legislature offers the 2010 example of an "embattled" Assembly speaker who lost his seat to scandal in 2010. Br. 21. On this the Legislature and the Center can agree – a high-profile scandal can affect any race. But the Legislature has not pointed to a single such scandal that flipped a district under Act 43. Even had it done so, it would have proven nothing. The statewide results were the predictable, and predicted, result of the Legislature's calculated gerrymander. Partisan gerrymanders work statewide, not district by district.

III. Voters Have Representational Interests and Rights that Extend Far Beyond Constituent Services.

In Section II.C, the Legislature seems to claim that those in the minority party suffer no harm from their gerrymander because the minority party voters are "[n]ot [d]eprived of [r]epresentation or [a]ccess to the [p]olitical [p]rocess." Br. 23. But, this truism—that all voters are represented by the representative from their district regardless of how they voted—ignores the real-world relationship between elected officials and their constituents.

To be sure, each person residing within a district, whether Republican, Democrat, Independent, or none-of-the-above, has a person in the state legislature designated as his or her representative. Even voters who did not support a legislator may be able to get help with a pass to tour the White House or funding to repair a local bridge or extend a bike trail. The Legislature's point is that the "name of the majority party has no bearing on a great many of the services that legislators provide their constituents on a day-to-day basis." Br. 25. But, their representatives do not represent or speak on behalf of the minority party voters on the issues that matter most. As a practical matter, an elected official in a gerrymandered safe district can freely ignore the policy concerns of those constituents who play no role in getting the representative elected. And voters everywhere are adversely affected by the distorted and unrepresentative legislature Act 43 produces. As former Wisconsin Senate Majority Leaders from both parties recently wrote in the Washington Post, a

"different kind of politics" takes hold when maps are "rigged" and politicians no longer "ha[ve] to win votes from the middle":

> With party control pre-decided, most legislators care only about their primary elections. Everyone knows who's going to win the general election. There's much less incentive to reach bipartisan compromise. Instead, we see policy decided in partisan caucuses, leaving the minority out in the cold.

Tim Cullen & Dale Schultz, *We led the Wisconsin Senate. Now we're fighting gerrymandering in our state*, Wash. Post, June 20, 2017 (emphasis supplied).[13]

The Legislature misconstrues *Shaw v. Reno*, 509 U.S. 630, 648 (1993) for the proposition: "[P]resum[ing] that voters who support[] losing candidates are deprived of representation" is "antithetical to our system of representative democracy." Br. 23. In fact *Shaw* says the opposite. Describing a racial gerrymander, the Court wrote:

> The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group,

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[13] https://www.washingtonpost.com/opinions/we-led-the-wisconsin-senate-partisan-gerrymandering-in-our-state-and-others-goes-too-far/2017/06/20/8978544e-55d1-11e7-ba90-f5875b7d1876_story.html?utm_term=.563d4d7fc4c0 (emphasis added).

> rather than their constituency as a whole. That is altogether antithetical to our system of representative democracy.

Shaw, 509 U.S. at 648. The same holds true for a partisan gerrymander. The Republican legislators have every reason to cater to their core voters and every incentive to ignore the interests of the minority-party voters.

The Legislature contends that votes for the losing candidate can force the winning candidate to "'adopt more moderate centrist positions' and to be more responsive to independent and swing voters." Br. 26 (quoting Opinion below (Griesbach, J., dissenting), JSA 287a). But that holds true only in competitive districts. Act 43 intentionally minimized this salutary feature of a republican form of government.

The Legislature claims "unexpectedly close" elections serve as beneficial "wake-up call[s]" for politicians. Br. 26. But in a gerrymandered legislature the majority can sleep undisturbed. "Unexpectedly close" elections are too rare to serve as any meaningful check on the majority party's gerrymander, or realistically cause a candidate "to be more responsive to the independent and swing voters." *Id.*; *see also* pp. 12–14 above on frequency of competitive elections. The Legislature also overlooks the data regarding polarization of legislatures, which places Wisconsin near the top of the list. Boris Shor & Nolan McCarty, *Ideological Mapping of American Legislatures*, 105 Am. Pol. Sci. Rev., 530, 537, 540, 546 (2011). The Wisconsin Legislature's documented high degree of political polarization even before 2011 refutes the Legislature's claim that the ordinary processes of democratic

elections will bring legislators to the center and cause them to moderate their views. Br. 23-26.

This polarization has reinforced the dominance of a caucus system in the legislature, demanding fealty to the majority of the caucus and eliminating even the possibility of dialog with minority legislators. *See e.g.*, JSA 8a-9a (describing how caucus system blocks minority-sourced legislation).

The relationship between elected officials and constituents that the Legislature lauds in an audacious effort to argue that gerrymanders do no harm is not only counterfactual, it is not in keeping with this Court's previous statements on the subject. *See* p. 11 above; *see also Vieth*, 541 U.S. at 329–30 (Stevens, J., dissenting) ("Gerrymanders subvert that representative norm because the winner of an election in a gerrymandered district inevitably will infer that her success is primarily attributable to the architect of the district rather than to a constituency defined by neutral principles.); *Bandemer*, 478 U.S. at 132 ("[U]nconstitutional discrimination occurs ... when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.").

IV. The Authors of Act 43 Did not Assume Away Party Volatility–They Planned for It.

The Legislature offers another surprising defense in Section II.D of its Brief. Partisan gerrymandering claims, it says, "ignore the reality" that how a voter voted in past elections does not "necessarily dictate[] what results that voter would prefer to see in the next election." Br. 27. This is an empirical claim that voter movement from one party to another prevents mapmakers from severely impeding the voting strength of either party. Thus, lawmakers who spent some $431,000 to build one of the most partisan districting plans in U.S. history now contend that gerrymanders do not work. JSA 246a-247a.

Gerrymandering claims do not rely on any assumption that, at the individual level, "party affiliation rarely changes" or "candidates do not matter." Br. 29. Indeed, anticipating vote switching—and insulating partisan advantage against it—is an essential part of any gerrymandering project, and was here. These phenomena occur, but they do not occur in sufficient numbers to overcome the advantage that Act 43 built into a majority of districts.

The Legislature's expert, Professor Gaddie, conducted elaborate analyses to test how maps would respond to changes in party preference. JSA 22a-23a, 27a, 41a-42a, 54a, 131a; SA 335-339 (Prof. Gaddie "S Curves"). His predictions were borne out: the gerrymandered map was robust enough in the face of normal political ebbs and flows to give Republicans what they paid for—a severe and durable partisan

advantage.[14] Professors Mayer and Jackman tested the same thing: how would the gerrymander hold up in the face of likely shifts in party preference? They correctly predicted that the Act 43 map would reliably produce Republican majorities even in years where the Republican vote share sagged well below 50%. JSA 148a.[15] All the experts agreed on this general method. JSA 149a at n.255.

Indeed, Professor Jackman projected almost exactly how the efficiency gap would react in a year like 2016 when the Republicans did well. He predicted 10% and the actual efficiency gap was around 11%. Br. of Eric McGhee as *Amicus Curiae* in Support of Neither Party at 17, n.6; SA 360. His sensitivity testing further shows that even had the trend from 2012 to 2016 been

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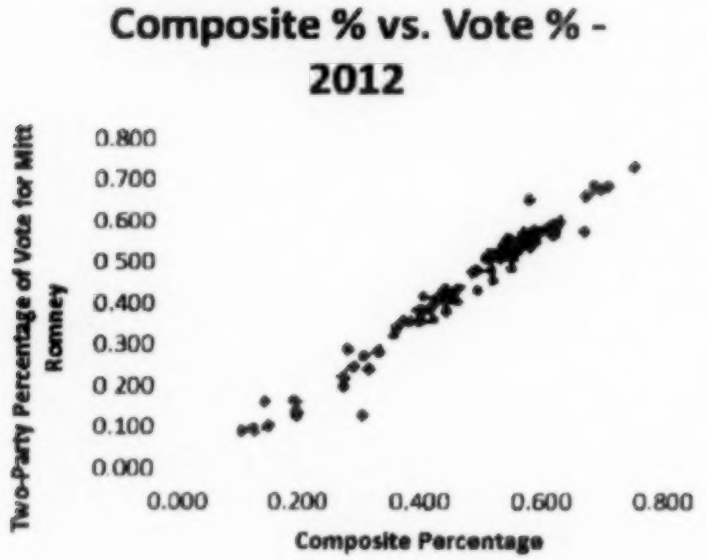
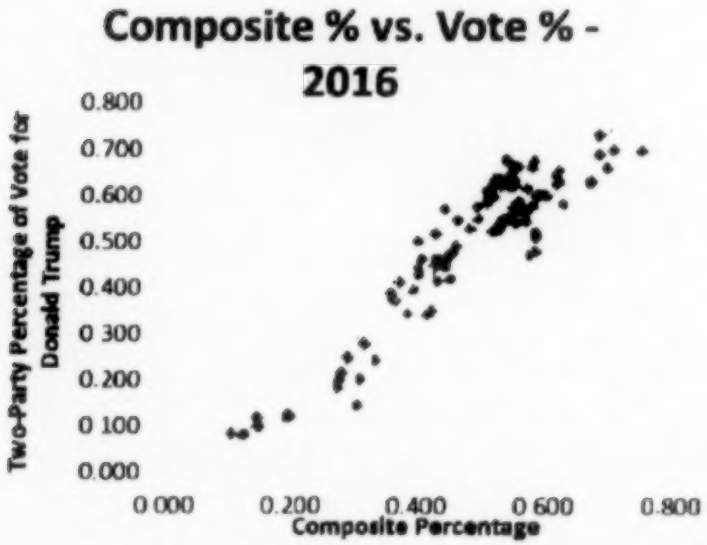
[14] If accepted, this argument would also defeat claims of racial vote dilution. While race is immutable, voting preferences are not. Racial vote dilution claims therefore depend on a link between voting preferences and race that is no less empirical than the link between voting preferences and party.

[15] The Legislature also points out that the gerrymander challenged in *Vieth* and another judicial gerrymander cited by the *Vieth* court in North Carolina failed to hold up. Br. 27. As with the partisanship/vote correlation argument (*see* above at 14–21), here the Legislature selects a few examples purporting to disprove a general rule. But, those picks again prove only the unremarkable proposition that political behavior is not a perfect science. This occasional failure of a gerrymander may reflect on the skill of the gerrymanderers, the over-ambitious drawing of maps or wave elections. The Legislature has not and cannot show that any gerrymander meeting the standards set forth by the district court in this case would likely fail. To the contrary, the district court required proof that an intentionally discriminatory map would likely endure throughout the period of the gerrymander. JSA 148a-152a, 158a, 166a, 172a.

Democratic, the gerrymander would still have produced reliably pro-Republican seat shares. *Id.*, JSA 148a, 152a at n.262, 165a.

Moreover experience confirms the accuracy of the Legislature's 2011 district-by-district partisanship composite scores as predictors of 2012 and 2016 presidential election results.





Graphs generated by Microsoft Excel 2010 from composite scores at SA 325 and data compiled by DailyKos.[16]

Statistics purporting to show "significant intra-decade volatility in partisan balance" are less persuasive still. Br. 28. As the Legislature would have it, frequent changes in party control under the same electoral map would suggest legislative power in Wisconsin goes solely and simply to the party whose "candidates do a better job than their counterparts at earning votes." Br. 29. In fact, Wisconsin's actual "intra-decade volatility" suggests the opposite. Under the court-imposed non-gerrymandered map in force from 2004-2010, both parties won and lost seats, with Republicans gaining, losing, then regaining majorities in both legislative chambers as one would expect absent gerrymandered districts engineered to survive common partisan shifts. By contrast, in the wake of Act 43, starting in 2014 only four races changed party out of 198 races held. *Wisconsin Election Results*, *supra*. The "simple explanation" for this divergence is not better candidates, but gerrymandered safe majorities. And the record shows just how effective that gerrymander has been. In 2012, 51.4% of the statewide vote gave Democrats 39 Assembly seats, but a "roughly equivalent vote share for Republicans (52% in 2014) . . . translated into 63 seats"—yielding a 24-seat disparity. JSA 154a. The Legislature does not seek to explain this disparity.

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[16] *See* Jeffmd, *Daily Kos Elections' statewide election results by congressional and legislative districts*, Daily Kos, July 9, 2013, https://www.dailykos.com/stories/2013/7/9/1220127/-Daily-Kos-Elections-2012-election-results-by-congressional-and-legislative-districts.

CONCLUSION

The Legislature's counter-factual and counter-historical account only demonstrates why ordinary political processes have not and will not solve this problem. This Court should affirm the judgment of the district court.

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